MOTION FILED
JUN 8 - 2009

No. 08-1375

In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

Motion for Leave to File a Brief *Amici Curiae* in Support of Petitioners

Brief *Amici Curiae* Of National Council of Self-Insurers, Illinois Self Insurers Association and Ohio Self-Insurers Association

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPPORT OF THE PETITIONERS

The National Council of Self-Insurers, the Illinois Self Insurers Association and the Ohio Self-Insurers Association ask this Court for leave to file a brief *amici curiae* in support of the Petitioners.

The attorneys of record for the parties have received written notice that one or more of these associations intended to file a brief *amici curiae*. That notice was issued on May 18, 2009 – more than 10 days before the June 8, 2009 deadline for the submission of a brief *amicus curiae*.

Counsel for the Petitioner consented to the associations' filing of such a brief. Counsel for the Respondent withheld his consent.

As the Court will see ("Interest of the *Amici Curiae*," *post*), these associations are interested in the continued vitality of 'exclusive remedy' provisions under state workers' compensation schemes. They disagree with the Court of Appeals' holding; they are disturbed by the erosion of the 'exclusive remedies' that it portends.

Respectfully submitted,

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INTEREST OF *AMICI* CURIAE

The National Council of Self-Insurers[1] is a national organization of employers and professionals devoted to perpetuation and betterment of self-insurance for work-related injuries.

The Illinois Self Insurers Association is an association of Illinois employers (including public employers such as municipalities, school districts and other bodies politic, and many of the state's largest industries) who have been approved as self-insurers by the Illinois Workers' Compensation Commission.

The Ohio Self-Insurers' Association has over 250 members. Their employees account for one-third of the Ohio work force and 40 percent of the Ohio payroll.

The Court of Appeals' decision in the case at bar concerns these associations and their constituents. If that decision stands, the adversarial tensions that attend workers' compensation disputes may percolate uncontrollably. Employees, whose recourse historically has been limited to administrative proceedings, could also prosecute RICO[2] actions in state or federal courts.

Legitimate RICO actions could beget duplicative recoveries or contradictory results. Adroit jurisprudence might prevent or correct such anomalies. But it would not relieve employers of the

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[1] No counsel for any party wrote any part of this brief *amici curiae*. No one other than the *amici curiae* made a monetary contribution to preparation and submission of this brief *amici curiae*.

[2] The Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§1961-1968.

amplified cost of defending workers' compensation claims in multiple forums.

SUMMARY OF THE ARGUMENT

Employers are functionally 'insurers,' and injured workers are 'insureds,' as a consequence of workers' compensation laws. Those laws impose upon employers responsibility for all sorts of industrial injuries – even when they are blameless. To balance that breadth of liability, legislators restricted its depth. Compensation was strictly limited to benefits established by workers' compensation statutes.

That balance is imperiled by an injured worker's right to sue under RICO.

ARGUMENT

I.

THE INTERPLAY BETWEEN RICO AND WORKERS' COMPENSATION LAW HAS NATIONWIDE IMPLICATIONS.

The Court of Appeals has determined that a civil suit under RICO[3] is viable, notwithstanding the "exclusive remedy" provision of the Michigan Workers' Disability Act.[4] *Brown v. Cassens Transport Co.*, 546 F.3d 347 (6th Cir. 2008). The resultant precedent has transcendent implications. Workers' compensation laws, though varying somewhat from state to state, are ubiquitous:

> There is a workmen's compensation act for each of the 50 states, and for five of the six other "States" we were asked to study. There are also two Federal workmen's compensation programs, for a total of 58 jurisdictions. (See Glossary) No two acts are exactly alike, but many have similar basic features.
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> Report of the National Commission on State Workmen's Compensation Laws, Part I, ch.1, p. 32 , (U.S. Government

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[3] *Supra.* See Note 2.

[4] Mich. Comp. Laws, §418.01, *et seq.*; Mich. Comp. Laws, §418.131(1).

Printing Office, 1972) [hereinafter "1972 Commission Report"].

Those workers' compensation laws almost universally have "exclusive remedy" provisions that limit employers' liability to injured workers to the benefits established by the respective workers' compensation acts. 6 Arthur Larson, Larson's Workers' Compensation Law, §§ 101.01-101.02, pp. 101-1 – 101-6 (Matthew Bender & Co., Inc., 2007). Even federal workers' compensation systems have "exclusive remedy" provisions. *See, e.g.,* the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905.

In Illinois there are about 250,000 work-related injuries per year. Illinois Workers' Compensation Commission, FY2007 Annual Report, p. 13.[5] The Illinois Workers' Compensation Commission – the agency that enforces the Illinois Workers' Compensation Act[6] – receives 60,000 to 70,000 claims annually. *Ibid.* The median medical costs of those claims are $5,779.00. *Id.*, p. 22. Their median indemnity costs are $22,279.00. *Ibid.*

Nationally about 5% of the workforce are injured each year. *Ibid.* With medical and indemnity costs combined, the national median for work-related injuries is over $23,000.00. *Ibid.* About 2.5% of employers' payrolls go to workers' compensation premiums. *Ibid.*

'Insurers,' however, are not the only entities answering for work-related injuries. In Illinois

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[5] http://www.iwcc.il.gov/annualreport07.pdf

[6] 820 Ill. Comp. Stat., ch. 305, § 13 (2008).

almost 300 employers are approved self-insurers.[7] *Id.*, p. 9. "Less than 1% of employers self-insure, but they are among the largest organizations in the state, and employ roughly 10% of the employees in Illinois." *Ibid.*

In 2005 $2.4 billion was spent on Illinois workers' compensation benefits. *Id.*, p. 23. Nationwide, some $52.00 billion was expended. *Ibid.*

Should the *Brown* decision stand, employers' limited liability, heretofore ensured by "exclusive remedy" provisions, will be largely nullified. That nullification would substantially increase the costs of doing business – directly for self-insured employers; indirectly, through premium increases, for others. The most benign effect of such increases would be commensurate rises in the costs of goods and services. But the economic impact could be so profound that some employers would curtail or close their operations.

The *Amici* therefore pray that this Honorable Court grant the Petition for a Writ of Certiorari.

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[7] 820 Ill. Comp. Stat., ch. 305, § 4(a) (2008).

II.

'REVERSE PRE-EMPTION' INSULATES EMPLOYERS FROM CIVIL LIABILITY UNDER RICO.

A.

State Laws Regulating The Business Of Insurance Are Not Always Subordinate To Federal Legislation.

Federal laws typically trump state laws. See, *e.g., California Federal Savings & Loan Association v. Gurerra,* 479 U.S. 272, 280-81, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). Even when Congress does not expressly invoke its power of preemption, if federal and state enactments clash, the former usually prevail. *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996).

There is, however, an exception to this general hierarchy: the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 34, as amended, 15 U.S.C. §1012(b). That Act provides[8]: "No Act of Congress shall be

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[8] A more complete recital of the McCarran-Ferguson Act reads:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act

construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."

That enactment generated a "special anti-preemption rule," *Barnett Bank, supra,* 517 U.S., at 28. "[S]tate laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *United States Department of Treasury v. Fabe,* 508 U.S. 491, 507, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

The consequence of the McCarran-Ferguson Act, therefore, is "reverse" preemption. See, *e.g., Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London,* 543 F.3d 744, 747, n. 4 (5th Cir. 2008). Reverse preemption should apply here. The decision from the Court of Appeals should therefore be reversed.

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of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

59 Stat. 34, 15 U. S. C. § 1012.

B.

RICO Does Not Specifically Relate To The Business Of Insurance.

"RICO is not a law that 'specifically relates to the business of insurance'." *Humana Inc. v. Forsyth,* 525 U.S. 299, 307, 119 S.Ct. 710, 1426 L.Ed.2d 753 (1999).

C.

Workers' Compensation Laws Are Enacted To Regulate The Business Of Insurance.

1.

Common Sense Should Prevail.

This Court has promoted a "common-sense" approach to questions of preemption. *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). There the Court considered whether a Massachusetts statute "is a law 'which regulates insurance' . . . and so would not be pre-empted. . . ." *Id.,* 471 U.S., at 738 (addressing ERISA[9]). That statute required that some minimum *mental*-health coverage be

[9] The Employee Retirement Income Security Act of 1974 ["ERISA"], 88 Stat. 832, as amended, 29 U.S.C. §1001, *et seq.*

included in insurance policies or health-care plans that cover hospital and surgical expenses. *Id.,* 471 U.S., at 727. Invoking common sense, the Court determined that the state law indeed 'regulated insurance.' *Id.,* 471 U.S., at 740, 743.

Common sense has a significant role in the interpretation of the McCarran-Ferguson Act, *supra.* That Act saves from preemption state laws that have "the purpose of regulating the business of insurance. . . ." 15 U.S.C. §1012(b). "Rather than use the technical term 'underwriting' to express its meaning, Congress chose 'the business of insurance,' a common-sense term connoting not only risk underwriting, but contracts closely related thereto." *Group Life & Health Insurance Co. v. Royal Drug Co.,* 440 U.S. 205, 247, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979).

In *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002), the Court endorsed 'common-sense' as a proper methodology for construing both ERISA and McCarran-Ferguson. *Id.,* at 366. Later – in *Kentucky Association of Health Plans v. Miller,* 538 U.S. 329, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003) – the Court declared that the 'savings' criteria under ERISA and the 'reverse-preemption' criteria under McCarran-Ferguson were distinct. *Id.,* 538 U.S. at 339-42. But in no way did it banish common sense from any preemption calculus.

2.

Workers' Compensation Laws
Regulate The Business Of Insurance.

Workers' compensation laws – which establish substantive rights, provide (and limit) enumerated remedies, empower agencies to administer the laws and resolve disputes, and promote streamlined resolution of claims[10] – certainly were enacted "for the purpose of regulating" something. 15 U.S.C. §1012 (b). For McCarran-Ferguson to have effect, that 'something' must be "the business of insurance." *Ibid.*

The Court of Appeals decided that workers' compensation was not "insurance." *Brown, supra,* 546 F.3d, at 360. It determined that employers were not insurers, and employees not insureds, because a duty to compensate injured workers existed independent of an insurance contract. *Id.*, 546 F.3d, at 359-60. The lower court, however, was insensitive to the nuances of workers' compensation law.

Under the common law, employers ('masters') owed their employees ('servants') the duty to refrain from negligent conduct that could cause injury. But there was no duty to compensate injured workers – even those injured by their employers' negligence. A duty to compensate arose only after the workers survived a gauntlet of defenses. Employers had no 'duty to compensate' if their employees were even partially to blame for their injuries ('contributory

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[10] *Via, e.g.*, "simple and summary" procedures. 820 Ill. Comp. Stat., ch. 305, § 16 (2008).

negligence'). Employers had no 'duty to compensate' if their employees were injured through the fault of co-employees ('fellow servant doctrine'). Employers had no 'duty to compensate' if their employees were injured as a result of known perils ('assumption of risk'). 1 Larson, *supra,* § 2.03, pp. 2-3 – 2-5. *See also Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N.E. 211 (Ill. 1914).

As a result of these manifold impediments, most injured workers went uncompensated. The remainder still suffered the significant delay and substantial expense that attended civil litigation.

> At the opening of the 20th century, the shortcomings of the legal remedies for work-related injuries were common knowledge. The compensation system which based liability on negligence was an anachronism in a time when work was recognized to involve certain inherent and often unpredictable hazards. Awards for injuries generally were inadequate, inconsistent and uncertain. The system was wasteful, particularly because of high legal costs. Settlements were delayed by court procedures.
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> 1972 Commission Report, *supra,* Part I, ch. 1, p.34 (emphasis added).

Workers' compensation laws did not merely tinker with the tort system. They supplanted it on a broad scale. The resultant, remedial statutes "aimed

to provide adequate benefits, while limiting the employer's liability strictly to workmen's compensation payments." *Ibid.* (Emphasis added.) "Most radical . . . was the establishment of a legal principle alien to the common law: liability without fault." *Ibid.* That liability "is not a tort liability but is an obligation imposed as an incident of the employment relationship, the cost of which is to be borne by the business enterprise." *Arnold v. Industrial Commission,* 21 Ill. 2d 57, 61, 171 N.E.2d 26 (Ill. 1960).

The presumed *sine qua non* of 'insurance' that the Court of Appeals found to be lacking under workers' compensation schemes – "no insurer and no insured," *Brown, supra,* 546 F.3d, at 360 – is actually an historical vestige, not a dispositive distinction:

> The no-fault approach spread rapidly: between 1911 and 1920, all but six States passed workmen's compensation statutes. These laws were influenced by the contemporary interpretations of constitutional law. . . . New York . . . would have adopted the German compensation plan's feature of employee contributions had this been deemed constitutional.
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> 1972 Commission Report, *supra,* Part I, ch. 1, p. 34 (emphasis added).

Workers' compensation laws have been described as "state-mandated insurance systems that provided benefits to employees for work-related

injuries without regard to fault." *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 125 (4th Cir. 1995) (emphasis added). The National Commission that Congress[11] tasked to study the state of workers' compensation laws reported:

> Workmen's compensation is an insurance program designed to protect workers and their families against wage loss due to work-related injuries or diseases. . . .
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> 1972 Commission Report, *supra*, Part II, ch. 3, p. 58 (emphasis added).
>
> * * *
>
> The primary contribution to safety provided by workmen's compensation probably comes from the financial stimulus inherent in the insurance rate-making procedures used in every state.
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> *Id.*, ch. 5, p. 93 (emphasis added).

The National Commission's perception of the essential nature of workers' compensation is not unique. A renowned commentator on workers' compensation stated: "The distinctive feature of compensation insurance is that, although it arises from a contract between the employer and the carrier, it creates a sort of insured status in the

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[11] The Occupational Safety and Health Act of 1970, Pub. L. 91-596, Sec. 27, 84 Stat. 1616, 29 U.S.C. §676.

employee which comes to have virtually an independent existence. . . ." 9 Larson, *supra,* § 150.20[1], pp. 150-9 – 150-11 (emphasis added).

For all practical purposes, then, workers' compensation laws govern "the business" of workers' compensation "insurance."

3.

In Responding To Work-Related Injuries Employers Act As Insurers.

This Court does not typically decide cases on the basis of mere labels.[12] Addressing a similar issue – whether Illinois' Health Maintenance Organization Act[13] was preempted by ERISA[14] – the Court declared: "Rush cannot check common sense by trying to submerge HMOs' insurance features beneath an exclusive characterization of HMOs as providers of health care." *Rush Prudential, supra,* 536 U.S., at 370.

Functions, not facile generalizations, determine whether or not a particular enterprise is subject to preemption. "That HMOs are not traditional 'indemnity' insurers is no matter. . . ." *Rush Prudential, supra,* 536 U.S., at 372-73 (internal quotation omitted).

The core functions of employers and workers' compensation insurers, *vis-à-vis* workers' compensation claims, are essentially indistinguishable.

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[12] "[M]ere matters of form do not detain us." *Fabe, supra,* 508 U.S., at 506 (*quoting SEC v. National Securities, Inc.,* 393 U.S. 453, 460, 89 S.Ct.564, 21 L.Ed.2d 668 (1969)).

[13] 215 Ill. Comp. Stat., ch. 125, § 4-10 (2000).

[14] 88 Stat. 832, as amended, 29 U.S.C. §1001, *et seq.*

Reverse preemption should therefore apply to both, by virtue of the criteria under the McCarran-Ferguson Act, 15 U. S. C. § 1012(b).

This Court has identified "three factors used to point to insurance laws spared from federal preemption under the McCarran-Ferguson Act. . . ." *Rush Prudential, supra,* 536 U.S., at 373:

> [1] practices or provisions that "ha[ve] the effect of transferring or spreading a policyholder's risk;
>
> [2] . . . [that are] an integral part of the policy relationship between the insurer and the insured; and
>
> [3] [are] limited to entities within the insurance industry."
>
> *Ibid.* (*quoting Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119, 129 (1982); internal quotation marks omitted).

In its effort to abide by those factors, however, the Court of Appeals fixated on formalistic technicalities:

> [T]he employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries, and workers' compensation merely creates a legislative remedy regarding the tort-liability relationship between employees and their employers, not an insurance contract. There is therefore no insurer and no insured.
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> *Brown, supra*, 546 F.3d, at 359-60

But workers' compensation laws did not "merely" create legislative remedies for "tort-liability." They instead imposed *no-fault* liability – "a legal principle alien to the common law," 1972 Commission Report, *supra*, Part I, ch. 1, p. 34 – and *transferred* the economic risk of injury from isolated workers to the industry in which they were engaged. "Compensation for work-related accidents was therefore accepted as a cost of production." *Ibid.*

The relationship between employees and employers may lack the linguistic plumage that the Court of Appeals demanded. But that relationship still walks and quacks like "insurance." Employers should receive the same common-sense treatment as health maintenance organizations ["HMOs"]. Even though HMOs are not insurance companies *per se*, and even though they provide services outside the realm of traditional insurance, state laws directed to them are still laws regulating insurance. *Rush Prudential, supra*, 536 U.S., at 372-73.

Workers' compensation laws also pertain to the third McCarran-Ferguson factor: the liabilities,

rights and remedies they create form an "integral part of the policy relationship" between employees and employers. They confer an 'insured' status upon employees, despite the absence of a traditional policy relationship. Coverage under workers' compensation has even been deemed to be part of the employment *contract*:

> The provisions of the act become a binding contract as to all who accept them. So far as employers and employees under the act are concerned, all accidental injuries to workmen arising out of and in the course of their employment are to be paid for by the employer in whose service the injury occurred . . . at the rate fixed in the schedule established by the act. This provision constitutes part of the contract entered into by the election to accept the provisions of the act.
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> *Keeran v. Peoria, Bloomington & Champaign Traction Co.*, 277 Ill. 413, 421, 115 N.E. 636, 639 (Ill. 1917)

States' workers' compensation laws may not explicitly "alter or control the actual terms of insurance policies. . . ." *Kentucky Association, supra,* 538 U.S., at 338. They don't have to. "[I]t suffices that they substantially affect the risk pooling arrangement. . . ." *Ibid.*

Workers' compensation laws *dictate* or *supersede* contractual terms and conditions . . . and extend coverage from the *nominal* 'insureds' (employers) to

the true beneficiaries – the injured workers. "Compensation insurance . . . has come to be an integral part of the compensation system; and the ultimate object of that system is the assurance of appropriate benefits to employees." 9 Larson, *supra,* § 150.02[1], p. 150-10. Professor Larson presented an anticipatory rejoinder to the Sixth Circuit's rigid rationale:

> The distinctive feature of compensation insurance is that, although it arises from a contract between the employer and the carrier, it creates a sort of insured status in the employee which comes to have virtually an independent existence. If compensation insurance did no more than protect the employer from any liability incurred by the employer under compensation law, there would be no occasion for a discussion of such insurance in connection with compensation law at all; the employer's rights would be fixed by substantive compensation law, and all questions of the insurer's relation to the liability would be a simple application of the general law of insurance, just as an automobile liability insurer's position is worked out by a direct interpretation of the insurance contract. Compensation insurance, however, has come to be an integral part of the compensation system; and the ultimate object of that system is the assurance of appropriate benefits to employees. The

> insurance carrier therefore stands in two relations: to the employer, to protect it from the burden of its compensation liability, and to the employee, to ensure that he or she gets the benefits called for by the statute. The former relationship is governed largely by the insurance contract; the latter is governed by the statute.
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> *Id.* (footnotes omitted).

Exclusive remedies, in particular, are also "an integral part of the policy relationship between the insurer and the insured." *Rush Prudential, supra,* 536 U.S., at 773. Establishing no-fault liability for basic benefits as "the employer's exclusive liability for work-related injuries and diseases . . . was a deliberate choice." 1972 Commission Report, *supra,* Part I, ch. 1, p. 32. It is a "basic feature" of workers' compensation laws. *Ibid.*

> Workmen's compensation statutes, as an alternative to the common law and employers' liability acts, had many objectives, most of them designed to remedy past deficiencies. The statutes aimed to provide adequate benefits, while limiting the employer's liability strictly to workmen's compensation payments.
>
> *Id.,* Part I, ch. 1, p. 34 (emphasis added).

* * *

> Damage suits against employers by workers injured on the job are a possible substitute or supplement for workmen's compensation benefits. For reasons detailed in Chapter 7, we believe these suits are inappropriate. . . . We recommend that workmen's compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.
>
> *Id.*, Part I, ch. 2, p. 52 (emphasis added).[15]

Because the relationship between employers and employees, *vis-à-vis* spreading of risk and provision of benefits, is tantamount to "insurance," as that term is construed under the McCarran-Ferguson Act, state workers' compensation laws "[are] limited to entities within the insurance industry."

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[15] The findings and conclusions of the 1972 Commission Report were revisited in 2004, along with an updated assessment of implementation of the commission's "essential recommendations." No repeal or dilution of 'exclusive remedy' provisions was recommended. U. S. Department of Labor, State Workers' Compensation Laws in Effect on January 1, 2004 Compared With the 19 Essential Recommendations of the National Commission on, (2004)..http://www.workerscompresources. com/National Commission_Report/National_Commission/12004/Jan2004_nat_com.htm.State Workmen's Compensation Laws. (2004).

Such laws are not broad, societal imperatives or prohibitions. They are specific to employer-employee relationships, and the legal consequences arising from work-related injuries or illnesses.

Workers' compensation laws, therefore, satisfy all three factors for "[a] law regulating insurance for McCarran-Ferguson purposes. . . ." *Rush Prudential, supra,* 536 U.S., at 373.

4.

Reverse Preemption Applies
Even To Self-Insurers.

In the case at bar, of course, no true "insurance" company is involved. To the extent that the Petitioners would be protected by Michigan's 'exclusive remedy' provision,[16] however, their status as 'non-insurers' would be immaterial. *Rush Prudential, supra,* is again instructive, by way of parallel considerations with regard to HMOs:

> Even if we accepted Rush's contention, rejected already, that the law regulates HMOs even when they act as pure administrators, we would find the third factor satisfied. That factor requires the targets of the law to be limited to entities within the insurance industry, and even a matchmaking HMO would fall within the insurance industry.

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[16] Mich. Comp. Laws §418.131(1).

Rush Prudential, supra, 536 U.S., at 374-75 (emphasis added).

The defendants/petitioners in the instant case were subject a statute "regulating the 'business of insurance,'" just as HMOs were in *Rush Prudential, supra.* "There can be no doubt that the actual performance of an insurance contract falls within the 'business of insurance.'" *Fabe, supra,* 508 U.S., at 503. Performance of obligations under a workers' compensation system – an insurance analogue – likewise "falls within the 'business of insurance.'"

Under McCarran-Ferguson, therefore, their potential liability under RICO is negated by reverse preemption.

D.

Application Of RICO In The Underlying Case Would Violate, Impair or Supersede Workers' Compensation Laws.

The McCarran-Ferguson Act does not *automatically* invalidate application of federal law when it has the capacity to affect the "business of insurance." Before reverse preemption can occur, there must be some incompatibility between the federal and the state laws. "When federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action." *Humana*

Inc., supra,, 525 U.S., at 303.

The Court of Appeals observed: "The district court's assertion that a RICO suit would impair the WDCA's policy of limited liability for employers relies on the faulty premise that the state has a policy of limited liability for employers even when they *fraudulently* deny worker's compensation benefits. No authority supports this position." *Brown, supra,* 546 F.3d, at 363 (emphasis in original). In Illinois (as in several other states[17]), however, even allegations of an insurer's "maliciously deceptive" handling of workers' compensation claims cannot breach the 'exclusive remedy' provisions[18] of the Illinois Workers' Compensation Act. *Robertson v. Travelers Insurance Co.,* 95 Ill. 2d 441, 448 N.E.2d 866 (Ill. 1983).

The Court should consider the wisdom of Professor Larson:

> It seems clear that a compensation claimant cannot transform a simple delay in payments into an actionable tort merely by invoking the magic words "fraudulent, deceitful and intentional" or "intentional infliction of emotional distress" or "outrageous conduct" in his complaint. The temptation to shatter the exclusiveness principle by reaching for the tort weapon

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[17] See, *e.g.,* 6 Larson, *supra,* §§ 100.01-100.04, pp. 100-1 – 100-22.

[18] 820 Ill. Comp. Stat., ch. 305, § 5(a) (2008); 820 Ill. Comp. Stat., ch. 305, § /11 (2008).

> whenever there is a delay in payment or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality.
>
> 6 Larson, *supra,* §104.05[3], pp. 104-35 – 104-35 (emphasis added).

On more than one occasion federal tribunals have expressly recognized and heeded Professor Larson's admonition. *Atkinson v. Gates, McDonald & Co.,* 838 F.2d 808, 814 (5th Cir. 1988); *Sample v. Johnson,* 771 F.2d 1335, 1347 (9th Cir. 1985).

When RICO and workers' compensation laws proscribe like conduct, but afford different (or, potentially, redundant) remedies, application of RICO will "violate" and "impair" the state enactments. As noted above, the no-fault liability engendered by workers' compensation laws was offset by *limited* liability. "The exclusive remedy provision 'is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.' (2A A. Larson, Law of Workmen's Compensation § 65.11 (1988).)" *Meerbrey v. Marshall Field & Co.,* 139 Ill. 2d 455, 462, 564 N.E.2d 1222 (Ill. 1990). Under statutory systems such as Illinois', unreasonable or vexatious conduct in the handling of workers' compensation claims can give rise to *additional*

liability under the Workers' Compensation Act.[19] But only under that Act. *Robertson, supra,* 95 Ill. 2d 441.

RICO, however, can disrupt the balance calibrated by state legislatures. It provides neither fair compensation, nor full compensation, but *treble* damages. 18 U.S.C. § 1964(c). In *addition* to multiplied damages, RICO imposes liability for prevailing plaintiffs' attorney fees. *Ibid.* Employers and insurers, therefore, may have to finance duplicative defenses – one before the administrative agency that adjudicates workers' compensation claims; another in the RICO action – provide treble, quadruple or 4.5 times damages,[20] and finance their employees' prosecutions of RICO actions.

Permitting RICO claims, arising out of workers compensation disputes, "would invite the indefinite prolonging of litigation and risk double recoveries and inconsistent findings of fact, a result which the legislature, in enacting a system of compensation in place of common law remedies, certainly wished to avoid." *Robertson,, supra,* 95 Ill. 2d 441, at 451.

This Court has declared: "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act

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[19] See, *e.g.*, 820 Ill. Comp. Stat., ch. 305, §19(k) (2008); 820 Ill. Comp. Stat., ch. 305, § 19(l) (2008).

[20] The underlying benefits wrongfully withheld, plus 50% penalties (820 Ill. Comp. Stat., ch. 305, § 19(k) (2008)), plus RICO's treble damages. 18 U.S.C. § 1964(c).

does not preclude its application." *Humana Inc., supra,* 525 U.S., at 301. With respect to Illinois law (and likely with respect to the law of most, if not all of the states[21]), however, RICO directly conflicts with state regulation – by permitting greater remedies, and potentially redundant compensation, in contravention of the Workers' Compensation Act's 'exclusive remedys' provisions.[22] Its application would also frustrate a declared state policy – the inextricability between no-fault liability and limited damages. *Robertson, supra,* 95 Ill. 2d 441, at 451.

> The [workmen's compensation] act, in taking away existing rights of action of the employee and extending the liabilities of the employer, fixes limits to the amount to be recovered, and is sustained as a legitimate exercise of the police power for the promotion of the general welfare by covering the entire subject with fixed rules.
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> *Matthieson & Hegeler Zinc Co. v. Indus-trial Commission,* 284 Ill. 378, 383,120 N.E. 249 (Ill. 1918) (emphasis added).

RICO is so potent that it can disrupt a state's administrative regime. Administrative adjudications may be postponed, pending the outcome of RICO actions. State-based fraud investigations might be deferred when complaints of fraud portend

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[21] See, *e.g.,* 6 Larson, *supra,* §§ 100.01-100.04, pp. 100-1 – 100-22.

[22] See note 18, *ante.*

resolution through civil actions. Baseless allegations, superficially dignified when motions to dismiss are denied, could precipitate needless investigations.

The economic impact of RICO could itself "frustrate . . . declared state policy or disturb the State's administrative regime." *Humana Inc., supra,* 525 U.S., at 304 (1999.) The 1972 national study of workers' compensation laws, though critical of the benefits then afforded under such laws, was sensitive to the costs of reform. 1972 Commission Report, *supra,* Part III, ch. 7, pp. 128-29. It estimated that implementation of its "essential recommendations" would raise workers' compensation premiums about 25% -- from "one percent or less" of payroll dollars to "1.25 percent or less." *Id.,* p. 128.

When the status of workers' compensation laws was revisited in 2004, on average 67.54% of the commission's recommendations had been met. U.S. Department of Labor, State Workers' Compensation Laws in Effect on January 1, 2004 Compared With the 19 Essential Recommendations of the National Commission on State Workmen's Compensation Laws, Table 1 (2004).[23] Yet by 2006 the national median insurance rates, per $100 of payroll, was $2.48 – almost double the percentage anticipated by the 1972 commission. Illinois Workers' Compensation Commission FY2007 Annual Report, p. 22; 1972 Commission Report, *supra,* Part III, ch. 7, p. 128.

Such costs can only escalate if federal litigation is allowed to sprout from workers' compensation disputes. If only one percent of work-related

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[23] http://www.workerscompresources.com/NationalCommission_Report/National_Commission/12004/Jan2004_nat_com.htm.

injuries were to generate RICO actions, every year there would be 600 to 2,500 RICO civil suits filed in Illinois alone – and multitudes more nationally. Illinois Workers' Compensation Commission, FY-2007 Annual Report, pp. 5, 13.

The proliferation of such litigation would not just be expensive to employers; it would be disruptive to the workers' compensation system as a whole. So found the National Commission:

> **Workmen's Compensation and Damage Suits**
>
> Damage suits against employers by workers injured on the job are a possible substitute or supplement for workmen's compensation benefits. . . . [W]e believe these suits are inappropriate.
>
> R2.18
>
> **We recommend that workmen's compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.**

1972 Commission Report, *supra*, Part II, ch. 2, p. 52 (boldface in original; emphasis added).

* * *

[C]osts of litigation which affect the performance of the delivery system . . .

may be . . . substantial. These costs include delays and uncertainties resulting from legalistic jousting over means of determining benefits, as well as the immeasurable cost of interference with or delay of rehabilitation of the disabled. An equally tragic side-effect of litigation is the tendency to polarize attitudes of labor and management to the extent that both resist reforms that would be to their common advantage.

Workmen's compensation can be undermined by excessive litigation.

Id., Part II, ch. 6, p. 100 (emphasis added).

* * *

The determination of negligence tends to be expensive and the outcome uncertain. Payments tend to be delayed when negligence suits are prosecuted, and overcrowded court dockets would compound the delays. Some workers eventually would receive damage awards in excess of workmen's compensation benefits, but others would receive no protection. Moreover, even when the worker succeeded in winning monetary damages, the litigation could be a substantial deterrent to successful rehabilitation.

> We conclude that damage suits are a distinctly inferior alternative to workmen's compensation.
>
> *Id.*, Part III, ch. 7, p. 120 (emphasis added).

Soon after the National Commission's endorsement of 'exclusive remedy' provisions generally, an Illinois court emphatically enforced its state's particular provision:

> The continued effectiveness of the workmen's compensation scheme depends upon the continued ability to spread the risk of such losses. This, in turn, depends upon the maintenance of the legislative scheme. If employers are required to provide not only workmen's compensation, but also to defend and pay in common law actions, their ability to spread such risks through reasonable insurance premiums is threatened. Any exceptions to the exclusive remedy provision of the Workmen's Compensation Act or any theories which allow that provision to be circumvented must be strictly construed.
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> *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 789, 354 N.E.2d 553 (Ill. App. 1976) (emphasis added).

Even without consideration of the McCarran-Ferguson Act's reverse preemption, at least one court has determined that "RICO would allow a claim . . . which the state act bars, resulting in a limitation, if not a conflict." *Tellis v. United States Fidelity and Guaranty Co.*, 625 F.Supp. 92, 95 (N.D. Ill.1985), *aff'd. on other grounds,* 805 F.2d 741, *vacated and remanded on other grounds,* 483 U.S. 1015, *aff'd. on other grounds,* 826 F.2d 477.

RICO, therefore, cannot be allowed to prevail over express provisions of state law that limit employers' liabilities under workers' compensation systems.

CONCLUSION

The Court of Appeals has allowed general federal legislation to disrupt state regulation of the business of insurance. Its ruling and rationale run afoul of the McCarran-Ferguson Act, and preemption principles generally. The *Amici* therefore pray that this Court grant the Petition for Certiorari filed by the defendants below.

Respectfully submitted,

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